ROBERT AND KRISTA JOHNSON
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-27-A Decided November 12, 1993

Appeal from a decision concerning the operation of a cable television system on the Fort Apache Indian Reservation.

Dismissed in part; affirmed in part.

1. Indians: Lands: Tribal Lands--Indians: Trust Responsibility

In matters relating to the use of tribal property, the Bureau of Indian Affairs' trust responsibility is to the tribe, not a person doing business with the tribe, even though that person may be Indian and a tribal member.

2. Administrative Procedure: Standing--Indians: Contracts: Generally

A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

3. Administrative Procedure: Standing--Indians: Generally

The qui tam provision of 25 U.S.C. § 81 (1988) authorizes Federal courts to hear suits brought under that section by third parties in the name of the United States and, under appropriate circumstances, to order the recovery of money paid by or on behalf of an Indian tribe. The Board of Indian Appeals is not a Federal court, and the qui tam provision does not grant standing in an administrative proceeding before the Board.

APPEARANCES: Dennis G. Chappabitty, Esq., Sacramento, California, for appellants; Kathleen A. Miller, Esq., office of the Field solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Robert and Krista Johnson 1/ seek review of an October 20, 1992, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (BIA; Area Director), concerning the operation of a cable television (CATV) system on the Fort Apache Indian Reservation (reservation). For the reasons discussed below, the Board of Indian Appeals (Board) dismisses the appeal in part, and affirms the Area Director's decision in part.

Background

On September 13, 1982, the Area Director approved a CATV license agreement between Krista, "who is doing business as a sole proprietorship under the name of THE NEW SYSTEM CABLE T.V.," and the Tribe (license) pursuant to 25 U.S.C. § 81 (1988). 2/ The license granted Krista the non-exclusive

---

1/ Krista is Indian and a member of the White Mountain Apache Tribe (Tribe). Robert is Krista's non-Indian husband.

It is possible that Robert lacks standing under 25 CFR 2.2. Robert is not a named party or a signatory to any license or lease with the White Mountain Apache Tribe (Tribe). Appellants state at page 2, footnote 1, of their opening brief that Robert "maintains ownership interest in New System Cable T.V.' and the 'WM Cable Company' which are named parties" to the license and leases described infra. The license and 1982 lease were between the Tribe and Krista as a sole proprietorship, and the 1990 lease was authorized by Tribal Resolution No. 11-89-267 to be granted "to tribal member Krista Tessay Johnson." Because there is no indication in the administrative record or appellants' filings that an assignment or transfer of the license and leases to a different business entity, having different principals, was approved by the Tribe and/or BIA, it is possible that Robert has no valid or legally protected interest in the license and leases. In that event he would lack standing to appeal from the Area Director's decision under 25 CFR 2.2. However, because Krista could maintain the appeal in her own right, the Board does not find it necessary to determine whether Robert has standing.

In addition, various company and partnership names associated with Krista and Robert appear in documents involved in this matter. It appears possible either that different business entities existed at various times, or that business names were not used consistently. For purposes of this decision, the Board does not find it necessary to attempt to sort out the legal identity and status of each of these business entities, or to determine whether they each had valid rights under the license and leases.

Unless specifically referring to Krista, the Board will hereafter refer to both the business entities and Krista and Robert individually as "appellants." The inclusion of Robert and the various business entities under the generic heading of "appellants" does not constitute a finding that he or they have either a valid and legally protected interest in the CATV system, or standing to pursue an appeal in his or their own names.

2/ Section 81 provides in pertinent part:

"No agreement shall be made with any tribe of Indians * * * in consideration of services for said Indians relative to their lands * * * unless such contract or agreement be executed and approved as follows:

* * * * * *

right of "receiving, distributing, and supplying radio, television and other cable communications services along, across and upon the streets, ways, easements, alleys and places within the Reservation" (License, section 4(a)), and authorized her "to enter into service agreements with occupants, users, lessees and permittees of land within the Reservation" (Id., section 4(b)).

In section 15 of the license, the Tribe agreed to lease 0.437 acres of land to Krista "for the purpose of erecting and maintaining antennas, towers, receiving dishes and related electronic equipment." This section was implemented through a separate lease with Krista, again as a sole proprietorship, which was approved by the Superintendent, Fort Apache Agency, BIA Superintendent), on September 27, 1982 (1982 lease). In addition to the uses specified in section 15 of the license, the 1982 lease allowed the property to be used for an office building. Section 10 of the lease stated that, unless otherwise provided, "a sublease, assignment or amendment of this, lease may be made only with the approval of the Secretary and the written consent of all parties to this lease, including the surety or sureties." 3/

On November 7, 1988, an agreement concerning ownership and management of the CATV system was executed between appellants; Clay Blanco; G. Bryan Blow; and Broadband Communications, Inc. (1988 agreement). Agreement ##8 and 9 assigned a percentage of the license and subleased the 1982 lease. Agreement #1 provided:

---

fn. 2 (continued)

"Second. It shall bear the approval of the Secretary of the Interior and the commissioner of Indian Affairs indorsed upon it.

* * * * * *

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

All further references to the United States Code are to the 1988 edition.

3/ 25 U.S.C. § 84 provides:

"No assignment of any contracts embraced by section 81 of this title or of any part of one shall be valid, unless the names of the assignees and their residences and occupations be entered in writing upon the contract, and the consent of the Secretary of the Interior and the Commissioner of Indian Affairs to such assignment be also indorsed thereon."

In addition, 25 CFR 162.12 states, with exceptions not applicable here:

"(a) * * * [A] sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties."

> If within NINETY (90) days of the execution of this Agreement the assignment of the License and the sublease of the Lease are not approved by the * * * Tribe and the Secretary of the Interior or his representative, and within said NINETY (90) days, the * * * Tribe has not passed a resolution approving said assignment and sublease, then this Agreement shall be void and of no effect.

There is no evidence as to whether the 1988 agreement was submitted for approval by the Tribe and/or BIA. It was not, however, approved by either. The record does not disclose how it was treated by the parties.

On December 1, 1989, appellants and BBM Communications, Inc., through Blow (BBM), entered into an agreement entitled "White Mountain Apache CATV System Management Agreement" (1989 agreement). The agreement provided that BBM had "the sole and exclusive responsibility for the supervisory management of the operation of the [CATV] Systems" (Section 4.2.a). BBM was to be responsible for the overall management of the CATV system, with appellants responsible for day-to-day operations. In any dispute, BBM would have 80 percent of the vote. BBM was also to receive 80 percent of the net operating profits. Section 1.e of the agreement provided that appellants would "be responsible for all communications, reports and representations to and with the White Mountain Apache Tribal Council, to maintain cordial relations and the legal right to continue the operation of the Systems, and its expansion." This agreement did not expressly assign or sublease the license or the leases. Furthermore, it did not provide for tribal and/or BIA approval, and there is no evidence that approval was sought. The limited materials before the Board suggest that both appellants and BBM initially conducted their affairs as if the 1989 agreement were valid and enforceable.

In December 1990, the Tribe leased a second site to Krista "for the purpose of constructing and operating a microwave television repeater tower site" (1990 lease). Section 11 of the 1990 lease prohibited subleases, assignments, or transfers of the lease or any right or interest under it without the Tribe's prior written consent. The lease was approved by the Superintendent on December 27, 1990.

On October 15, 1991, BBM filed a civil action against appellants in the White Mountain Apache Tribal Court. The suit alleged breach of the 1989 agreement. On the same day, the tribal court issued a temporary restraining order (TRO) under which appellants were ordered to

> (a) Relinquish possession of all business checkbooks, bank accounts and financial information and records to [BBM];
>
> (b) Provide [BBM] with access to and possession and control of all business and television equipment, including vehicles;
>
> (c) Refrain from interfering with [BBM's] operation and control of White Mountain Cable TV System, including countermanding instructions arid communications with customers;

(d) Relinquish possession and control of the business telephone and post office box to [BBM];

(e) Authorize [BBM] to secure and protect all property of White Mountain Cable TV System, including removal of equipment and records, supplies, etc., to other locations;

(f) Refrain from collecting and controlling business mail;

(g) Refrain from communicating with customers and suppliers of White Mountain Cable TV System unless specifically authorized by [BBM];

(h) Refrain from incurring any obligations or debts on behalf of White Mountain Cable TV System; and

(i) Refrain from interfering with television signals and/or reception equipment.

This TRO was to remain in effect through further proceedings scheduled for October 25, 1991. By a December 27, 1991, minute entry, the tribal court ordered that Krista: "1) be permitted on the premises; 2) have the right to an equal voice in business expenditures; 3) be a co-signator on the checking account of the business." 4/

In January 1992, appellants sought assistance from the Superintendent, alleging trespass by BBM against Krista's license and leases. Appellants argued:

> 1) the * * * Tribal Court illegally issued a TRO permitting BBM * * * to violate rights held by [Krista] under agreements approved by [the Superintendent]; 2) the illegal action permitted BBM to obtain rights in a manner that clearly evades and legally preempts BIA authority; 3) this action, taken in excess of [the Tribal Court's] subject matter jurisdiction, has caused grievous harm to [Krista's] federal rights; 4) the TRO has allowed a trespass of lands and business license rights held under agreements executed between the Tribe and [Krista]; and 5) the BIA has a mandatory legal obligation to [Krista] to fulfill in these factual circumstances.

(Letter of Jan. 27, 1992, at 1). Citing Merrill v. Portland Area Director, 19 IBIA 81 (1990); Smith v. Acting Billings Area Director, 17 IBIA 231, recon. denied, 17 IBIA 285 (1989); and Yavapai-Prescott Tribe of Indians v.

4/ Appellants have filed suit in Federal District Court. United States ex rel. Johnson v. BBM Communications, Inc., Civ. 91-1981 (D. Ariz.). Appellants indicate that this suit has been "unofficially stayed" pending the Board's decision in this appeal.

Watt, 707 F.2d 1072 (9th Cir. 1983), appellants contended that the tribal court's action constituted "a unilateral cancellation of the leases to the extent that [it] precludes [Krista's] exercise of the rights granted to her under the leases." Id. at 2. They argued that the Superintendent

> possess[ed] the authority to direct, by appropriate exercise of Secretarial authority, immediate dismissal of this Tribal court action for lack of subject matter jurisdiction. The BIA has been held to have fiduciary obligations to the management of Indian trust or restricted property pursuant to federal authority. While properties of the beneficial owner, the [Tribe], are leased to [Krista], the BIA is responsible for ensuring that they are protected. * * * This obligation is further underscored where the lessor Tribe refuses to enforce and protect the leases from an interloper and trespasser, BBM, who possesses no cognizable legal standing to assume any interest in [Krista's] rights. In discharging that responsibility, the BIA must act by taking proper action against BBM and the Tribal Court for permitting the violations of the leases.

Id. at 4.

On January 29, 1992, the Superintendent wrote to the Tribal Chairman, informing him of the dispute between appellants and BBM. The Superintendent stated: "It does not appear that Bryan Blow [BBM] has a valid assignment on the [reservation], to our knowledge. Please inform us if you would like [BIA] to take action and write a letter of trespass and have Bryan Blow removed. This would be in compliance with 25 USCA, Section 84." The Tribe did not respond to the Superintendent's letter.

On June 6, 1992, appellants again wrote to the Superintendent, seeking his assistance. The Superintendent responded on June 12, 1992, stating that BIA had "no trust responsibility to the lessee or licensee under an agreement with an Indian tribe. Our responsibility in this matter is to the [Tribe]. We will not interfere in this business dispute unless it is necessary to protect the possessory rights of the [Tribe]" (Letter at 1). The Superintendent recommended that appellants contact the Tribe directly about their concerns.

Appellants appealed this decision to the Area Director. At page 5 of their statement of reasons, appellants contended that

> BIA had a trust obligation to them and, if this obligation is not one arising from a Federal trust responsibility, that it had a legal duty to them to protect their business whose operation was derivative of federally-approved licenses and leases. The exercise of this trust or legal obligation toward the protection of their federal rights should have been even more required due to suspicious circumstances that may have reflected an illegal conspiracy by the lessor Tribe and a trespasser, G. Bryan Blow * * *. If the Superintendent had [conducted a more thorough

> examination after receiving no response from the Tribe], it is quite likely that he would have uncovered a scheme by tribal officials and the trespasser to jointly undermine the federal rights of [appellants] by a strategy of inaction by the Tribe to allow Blow to continue his destructive actions all toward an eventual take over by the Tribe to the pecuniary benefit of Blow.

On October 20, 1992, the Area Director affirmed the Superintendent's decision. He stated that, although the assignment of interests under the tribal leases and license was probably invalid for lack of tribal and BIA approval, BIA's trust duty was to the landowner, i.e., the Tribe, not to the lessee(s). He indicated that, in the absence of evidence of harm to the interests of the landowner or of a request by the landowner, BIA would not intervene. He further stated that BIA had no authority to direct the dismissal of an action in tribal court.

Appellants appealed the Area Director's decision to the Board. Briefs were filed on appeal by appellants and the Area Director. Although advised of their right to do so, neither the Tribe nor BBM entered an appearance.

Discussion and Conclusions

Stripped of rhetoric, appellants' argument asks the Department to review issues arising from a business dispute between themselves and BBM over the validity and/or interpretation of the unapproved 1989 agreement. In summary, appellants seek a determination that the 1989 agreement is invalid because it was not approved by BIA under 25 U.S.C. §§ 81 and 84, 5/ and that consequently, BBM acquired no rights under that agreement and is a trespasser on the properties leased to Krista and an intermeddler in her rights under the license. A finding by a Federal forum that the 1989 agreement required BIA approval apparently became necessary from appellants' perspective when the tribal court held that it had jurisdiction over the suit filed against them by BBM, and undertook to interpret the 1989 agreement. Appellants also seek a determination that BIA was required to take action in response to the tribal court's orders.

Appellants argued below that BIA owed them a trust duty. BIA understood this to mean appellants believed that, in the context of this case, they were beneficiaries of the Federal trust responsibility to Indian persons and tribes. Appellants have attempted either to clarify or expand this

---

5/ Appellants consistently cite section 81 as the statute requiring approval of the 1989 agreement. However, section 81 applies only to contracts with Indian tribes. See Quinault Allottees Assoc. v. United States, 453 F.2d 1272, 1276 n.3 (Ct. Cl. 1972). The Tribe is not a party to the 1989 agreement, and does not become one merely because it is a party to the underlying license and leases. The question, therefore, is whether the 1989 agreement is an assignment of a contract(s) embraced by section 81 which requires approval under section 84. The Board will treat appellants' arguments as referring to both sections 81 and 84.

argument. Appellants' contention that BIA has "fiduciary responsibilities" to them arising from the fact that Krista's license and leases were Federally approved is addressed separately. Because, however, the assumption that Krista is the beneficiary of a "Federal trust responsibility" still appears to underlie each of appellants' arguments, the Board first addresses this issue.

[1] BIA's trust duty is dependent upon the existence of a trust res. Here, the trust res is the real property which is held in trust for the Tribe. The Board has recently reiterated that, in situations involving trust real property, BIA's trust duty is to the Indian landowner. See Welmas v. Sacramento Area Director, 24 IBIA 264, 272 (1993); Gullickson v. Aberdeen Area Director, 24 IBIA 247, 248 (1993). The landowner here is the Tribe, and BIA's trust duty is to the Tribe.

Any assumption that BIA also owes Krista a trust duty must be based on the fact that she is Indian and a tribal member. The Board has considered numerous situations in which Indian individuals or tribes, each claiming to be the beneficiary of a trust duty, were involved on opposite sides in a dispute concerning trust real property. See, e.g., Welmas; Gullickson; Smith v. Acting Billings Area Director, 18 IBIA 36 (1989). In those cases, the Board held that BIA's trust duty was still to the landowner, and no trust duty was owed to other persons involved in the matter, even though those persons might be Indian. The same is true here. In the context of this case, BIA owes no trust duty to Krista, who is merely a person doing business with an Indian tribe.

[2] Appellants' first substantive argument is that the 1989 agreement is void for lack of BIA approval. Citing Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123 (1990), the Area Director contends that appellants lack standing to raise this argument because, as persons contracting with an Indian tribe, appellants do not fall within the zone of interest protected by sections 81 and 84. In Kombol the Board held:

> Assuming for the limited purpose of this part of the discussion that section 81 applied to this contract, the section was passed for the benefit and protection of Indians, not of those contracting with Indians. * * * As a person contracting with an Indian tribe, appellant is not within the zone of interest established by the statute. See, e.g., Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Essentially, the standing question * * * is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief"); Enterprise Management Consultants, Inc. v. United States, 685 F. Supp. 221 (W.D. Okla. 1988), aff'd, 883 F.2d 890 (10th Cir. 1989) ("No matter what may be the nature of a contract falling under section 81, the purpose of the statute is to protect the interests of Indians. This is old law * * *. [N]o rights emanate from section 81 for the benefit of or economic protection of [a person contracting with an Indian tribe]" (685 F. Supp. at 222-23)). Cf. Clausen v. Portland Area Director, 19 IBIA 56, 60 (1990), and cases cited therein (a

non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility).

(19 IBIA at 129-30).

Appellants argue that the Area Director failed to consider the qui tam provision of section 81. 6/ They contend that the interest they seek to protect is not that of the Tribe, but rather that of the United States in exercising "its duty, as trustee of tribal land and resources, to oversee certain contracts and agreements that are 'relative' to the tribe's lands and 'in consideration of services for said Indians'" (Reply Brief at 5-6). This argument places appellants in the anomalous position of contending that they have standing to pursue this administrative appeal against the United States in order to enforce the United States' interest in protecting the Tribe against a situation appellants created by entering into an agreement with BBM which they did not submit for approval.

[3] Assuming arguendo that the 1989 agreement either required approval under section 81, or that it required approval under section 84 and the qui tam provision of section 81 also applies to section 84, appellants' argument is unavailing. The qui tam provision of section 81 authorizes Federal courts to hear suits brought by third parties in the name of the United States, and, under appropriate circumstances, to order the recovery of money paid by, or on behalf of the tribe. This Board is not a Federal court, and has no authority to take the type of actions authorized under the qui tam provision. Whatever standing appellants may have in Federal court, 7/ the

---

6/ "'Qui tam' is short for 'qui tam pro domino rege quam pro se imposo sequitur,' meaning 'Who brings the action as well for the king as for himself.' Bass Anglers Sportsman's Soc. v. U.S. Plywood-Champion Papers, Inc., 324 F.Supp. 302, 305 (S.D. Tex. 1971)." United States ex rel. Yellowtail v. Little Horn State Bank, Cause No. CV 91-24-BLG-JDS, slip op. at 5, n.2 (D. Mont. Apr. 9, 1992). A qui tam provision, such as that in section 81, quoted supra, in footnote 2, allows outside parties to bring suit in the name of the United States.

7/ With their reply brief, appellants submitted a copy of the slip opinion of the United States District Court for the District of Montana in Yellowtail, supra. The court there considered the standing of a member of the Crow Tribe who sought to bring suit under the qui tam provision of section 81 to challenge certain loans made by the defendant bank to the Crow Tribe. Although the court concluded that the standing requirements of Article III of the United States Constitution were met through the "assignment" of the rights of the United States to the qui tam plaintiff, it also concluded that the qui tam plaintiff lacked standing because the United States itself lacked standing in that it had suffered no "distinct and palpable" injury. See also In Re: United States ex rel. Hall, 825 F. Supp. 1422 (D. Minn. 1993), and cases cited therein.

It thus appears that the mere fact that a suit is filed under the qui tam provision may not be sufficient to meet standing requirements in Federal court.

Board concludes that the qui tam provision of section 81 does not in itself grant them standing in this administrative proceeding.

Therefore, appellants' standing is controlled by the ruling in Kombol, under which, as persons contracting with an Indian tribe, they do not have standing to challenge the lack of approval of the 1989 agreement under sections 81 or 84. Accordingly, that portion of appellants' appeal which seeks a determination that the 1989 agreement is void for lack of approval is dismissed.

Taking a slightly different tack, appellants attack the tribal court orders. They cite Yavapai-Prescott Indian Tribe and Kuykendal v. Phoenix Area Director, 8 IBIA 76, 82 I.D. 189 (1980), in arguing that action by the tribal court is equivalent to action by the Tribe, and that the tribal court orders constitute a prohibited unilateral cancellation or assignment of Krista's license and leases. Appellants argue that this cancellation or assignment occurred when they were precluded by the TRO from exercising their rights under the license and leases, and that the length of time the TRO was in effect is immaterial. They further argue that BIA had an affirmative duty to take action in response to the allegedly illegal orders. Appellants also describe this claimed duty as a "fiduciary duty" owed to them because their rights were derived from Federally approved contracts.

Assuming arguendo that the 1989 agreement was subject to sections 81 and/or 84, and that in the present context the Board has authority to review the substance of the tribal court orders, 9/ the Board cannot conclude that those orders cancelled or assigned Krista's license and leases. To the contrary, those orders assume the continued validity of the license and leases, and address the business relationship created by two parties, including a tribal member, who voluntarily entered into a contract concerning rights under those documents. The fact that appellants were prevented for a period of approximately 2 months from taking certain actions does not mean that the license and leases were cancelled or assigned to BBM. It simply means that the tribal court was attempting to interpret the business relationship appellants and BBM established between themselves in the 1989 agreement as it related to the license and leases.

_____

8/ Because of this holding, the Board does not decide whether the 1989 agreement required Departmental approval under sections 81, 84, or any other statute or regulation.

9/ The Board has consistently held that, as part of the Department of the Interior, it is not a court of general jurisdiction, and has only that authority delegated to it by the Secretary. It has been delegated authority to review actions taken by BIA under 25 CFR Chap. I. It does not have general authority to review actions taken by duly constituted tribal governing bodies. 43 CFR 4.1(a)(2); Welmas, 24 IBIA at 268, and cases cited therein. The Board has specifically held that it does not have jurisdiction to review decisions rendered by tribal courts. In the Matter of Bonaparte, 23 IBIA 145 (1993); Blaine v. Aberdeen Area Director, 21 IBIA 173 (1992), and cases cited therein.

Appellants' argument that BIA had an affirmative duty to take action in regard to the tribal court orders appears to be based primarily upon the decision in Estate of Peshlakai v. Navajo Area Director, 15 IBIA 24, 93 I.D. 409 (1986), in which the Board stated that "when BIA receives information suggesting Federal regulations have been violated, it has an affirmative duty to inquire into the matter and take appropriate action to correct or end any violation found to exist" (15 IBIA at 37). Appellants contend that BIA failed to "take appropriate action to correct or end any violation found to exist." 10/ They argue that BIA must exercise the inherent authority of the Secretary to direct the dismissal of the tribal court suit, or that BIA must disapprove the tribal court orders.

Appellants cite no support for their contention that there is inherent Secretarial authority to direct the dismissal of a tribal court action, and the Board is not aware of any such authority. In the absence of proof that this authority exists, the Board concludes that the Department lacks authority to order the dismissal of the tribal court action.

As to disapproval of the tribal court's orders, the Peshlakai decision requires BIA to act only when it finds that a violation of Federal law has occurred. Because any such action by BIA may interfere with tribal sovereignty, BIA should have a reasonable basis for believing that the tribal action in fact violates Federal law. Cf. Wells v. Acting Aberdeen Director, 24 IBIA 142, 145 (1993), and cases cited therein ("[B]ecause BIA review of tribal enactments, even when required by statute or a tribal constitution, is an intrusion into tribal self-government, that review must be undertaken in such a way as to avoid unnecessary interference with the tribe's right to self-government").

Again assuming that the Board has any authority to review the substance of the tribal court orders, it finds nothing in those orders that is a clear violation of Federal law. Although appellants contend that a violation occurred when the tribal court concluded the 1989 agreement was not subject to section 81, whether the agreement constitutes an assignment of an interest in Indian lands within the meaning of 25 U.S.C. §§ 81 and 84 is open to dispute. In distinction from the 1988 agreement, the 1989 agreement does not expressly assign or sublease the license or leases to BBM and was not initially interpreted by the parties as requiring BIA approval. 11/ The

---

10/ Appellants also suggest that any inquiry made by BIA did not go far enough, because it did not disclose the conspiracy between BBM and the Tribe to destroy their business. BIA discharged its duty to inquire when it reviewed its records, informed the Tribe that BBM might not be legally involved in the CATV system, and asked if the Tribe wanted action taken against BBM.

11/ At pages 2-3 of their reply brief, appellants state:

"Attempts by BIA to shift the blame to Appellants for doing business with [Blow] ignore the fact that [appellants] have never agreed to the expansive reading accorded the 1989 management agreement by the Tribal Court. The rulings of the Tribal Court established the 'nexus' between the approved and unapproved documents in issue."

1989 agreement provides that BBM will manage the CATV system. Appellants, however, remain responsible for day-to-day operations and for maintaining relations with the Tribe.

The proper application of section 81 to types of contracts and situations not contemplated by its drafters continues to be a difficult question. See, e.g., Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169, 173-74 (1993); Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803 (7th Cir. 1993); 12/ Hall, 825 F. Supp. at 1432-34. Based upon the unsettled state of the law, the tribal court's conclusion that the 1989 agreement is not subject to section 81 is not clearly contrary to Federal law. 13J Faced with a reasonable doubt as to the legal status of the 1989 agreement and the lack of a request for assistance from the Tribe, for whose benefit sections 81 and 84 were enacted, BIA had no duty to take further action.

---

fn. 11 (continued)

Appellants do not indicate how they believe the tribal court "expanded" the 1989 agreement. It is possible, however, that appellants are attempting to argue that the agreement did not require approval as written, but does as "expanded" by the tribal court. Because of the Board's disposition of this case, it does not address this statement.

12/ Altheimer concluded that a contract entered into by a tribal corporation was a contract with an Indian tribe, but was not "relative to Indian lands" within the meaning of section 81. The court examined four factors in reaching its conclusion:

"1) Does the contract relate to the management of a facility to be located on Indian lands? 2) If so, does the non-[tribal] party have the exclusive right to operate that facility? 3) [Is] the [tribe] forbidden from encumbering the property? 4) Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign?" (983 F.2d at 811).

13/ Appellants appear also to suggest that in deciding whether the 1989 agreement was subject to section 81, the tribal court exceeded its subject matter jurisdiction and invaded an area of legitimate BIA/Federal concern.

A suit filed against a tribal member for breach of contract appears to be within the normal subject matter jurisdiction of the tribal court. See National Court Judges Association and BIA Branch of Judicial Services, Native American Tribal Court Profiles 1984, at 130: "The [White Mountain Apache] tribal court exercises jurisdiction over Indians in all substantive legal areas, including * * * civil * * * matters." Appellants have offered no evidence that the tribal court's jurisdiction does not extend to contract disputes involving a tribal member, or to addressing all issues raised in such a suit that are necessary for a decision.

Furthermore, to the extent appellants are suggesting that tribal courts lack authority to interpret or apply Federal law, the Board notes that, in at least one case, a tribal court has been recognized as an appropriate forum for the enforcement of rights arising under Federal law. See United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992) (Abstention by Federal court, in deference to tribal court, proper in trespass action brought by the United States under Federal law).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Acting Phoenix Area Director's October 20, 1992, decision is dismissed in part, and the decision is affirmed in part. 14/

_____
Kathryn A. Lynn
Chief Administrative Judge

I concur:

_____
Anita Vogt
Administrative Judge

14/ Any arguments not specifically discussed were considered and rejected.